Crossing the threshold

Crossing the Threshold: Judicial Clarity on Permanence Orders and the Adoption and Children (Scotland) Act 2007

Introduction

Where a local authority wishes to seek a permanence order in respect of a child in its area, it must petition the court in terms of ss80-84 of the Adoption and Children (Scotland) Act 2007 (the "2007 Act").[1] In a series of three cases from 2016 and 2017, the Supreme Court, Inner House, and Outer House have all given fundamental guidance on how these statutory provisions should be approached and applied: *In the Matter of EV (A Child)*,[2] *KR v Stirling Council*,[3] and *West Lothian Council, Petrs, re Children A & B*.[4] Rather than examining each case in turn, this note will consider the combined effect of this guidance, culminating in a suggested checklist for future permanence order petitions.

Permanence Orders

The primary impact of a permanence order is to vest in the local authority the responsibility of providing guidance to the child and the right to regulate the residence of the child.[5] It is in effect a step short of adoption, since it transfers the responsibility for care of the child to the local authority, without severing the legal parental status of the child's parents.[6] It allows for greater stability for the child than being removed from their families *without* the transfer of parental responsibilities and rights.[7] Permanence orders comprise a mandatory provision (regulating the child's residence)[8] and potentially a wide range of ancillary provisions,[9] which can be tailored to reflect the needs of the child, including the right to specify contact between the child and any person the court considers appropriate.[10] In any situation where it is proposed to interfere with the family life of parents and child, it is essential that this is done in accordance with law, in order to respect the article 8 rights of all parties.[11] Failure to follow the statutory procedure, or cross a statutory threshold, will rightly

[1] For a detailed account of the statutory provisions, see AB Wilkinson and KM Norrie, *The Law Relating to Parent and Child in Scotland*, ed KM Norrie (3rd ed, 2013), chapter 20 (hereafter "Norrie, *Parent and Child*").
[2] [2017] UKSC 15 (hereafter "*EV (A Child)*").
[3] [2016] CSIH 36.
[4] [2016] CSOH 50 (hereafter "*West Lothian Council, A&B*").
[5] Section 81(2)(a) and (b) of the 2007 Act, with reference to the parental rights and responsibilities set out in ss1(1)(b)(ii) and 2(1)(a) of the Children (Scotland) Act 1995 (hereafter the "1995 Act").
[6] Section 80(2)(c) provides for a permanence order to be granted with authority to adopt.
[7] The rationale for permanence orders, and the many reasons for their introduction, is set out in Norrie, *Parent and Child*, paras 20-01-20-03.
[8] Section 81.
[9] Section 82.
[10] Section 82(1)(e).
[11] See *In the matter of B (A Child)* [2013] UKSC 33, para 29 per Lord Wilson and para 62 per Lord Neuberger.

render the final decision open to challenge – and, as these cases demonstrate, application of the legislation must be precise.

The Golden Rule

In the 2013 English case of *In re J (Children) (Care Proceedings: Threshold Criteria),*[12] the Supreme Court provided clarity on how the English courts should determine care or supervision orders. The English orders are governed by section 31 of the Children Act 1989. The primary difference is the requirement in England to establish the likelihood of the child "suffering significant harm", compared with the test for permanence orders under the 2007 Act in Scotland, which requires a finding that the child's residence with a specific person will be, or be likely to be, "seriously detrimental" to the welfare of the child.[13] The question then arose as to whether the guidance from the Supreme Court on the English test of "significant harm" also applied to the differently-worded test of "serious detriment" in Scottish cases. It was on this sole point that leave to appeal to the Supreme Court was granted in *EV (A Child)*. In the appeal, however, it was accepted by all parties that *In re J* did apply: as Lord Reed noted, "The point which prompted the grant of permission to appeal does not, therefore, require to be decided."[14] Although not required to consider it, the UKSC nevertheless confirmed that their approach in *In re J* can apply to Scottish permanence cases, despite different legislation governing the issue.[15] With the Inner House having granted leave to appeal, however, the Supreme Court was not restricted to that specific issue, and consequently proceeded to review the case as a whole.[16] *EV (A Child)* is therefore valuable for (i) confirming the status of *In re J* in Scottish permanence order cases; and (ii) providing a meticulous analysis of the statutory requirements of the 2007 Act in respect of permanence orders.

As regards the first point, when granting (or not) a permanence order, the court will typically be required to determine whether the child's residence with a parent "is, or is likely to be, seriously detrimental to the welfare of the child".[17] In so doing, the court must make a prediction as to future outcomes. In the words of Lady Hale from *In re J*, and cited by Lord Reed:

> Care courts are often told that the best predictor of the future is the past. But prediction is only possible where the past facts are proved. A real possibility that something has happened in the past is not enough to predict that it will happen in the future. It may be the

[12] [2013] UKSC 9 (hereafter "*In re J*").
[13] See *EV (A Child),* para 19.
[14] *EV (A Child)*, para 3.
[15] *EV (A Child)*, para 62.
[16] *EV (A Child)*, para 2.
[17] Section 84(5)(c)(ii) of the 2007 Act, in Scotland. The court must make this decision: Lord Reed emphasised that the court of first instance is not exercising a supervisory or review function in these cases, but is the primary decision maker: *EV (A Child)*, para 18.

> fact that a judge has found that there is a real possibility that something has happened. But that is not sufficient for this purpose. A finding of a real possibility that a child has suffered harm does not establish that he has. A finding of a real possibility that the harm which a child has suffered is 'non-accidental' does not establish that it was. A finding of a real possibility that this parent harmed a child does not establish that she did. Only a finding that he has, it was, or she did, as the case may be, can be sufficient to found a prediction that because it has happened in the past the same is likely to happen in the future. Care courts need to hear this message loud and clear.[18]

This was formulated as a golden rule by Lord Hope also in *In re J*, and also approved by the Supreme Court in *EV (A Child)*: "the golden rule must surely be that a prediction of future harm has to be based on facts that have been proved on a balance of probabilities".[19]

Thus, the first principle that can be derived from *EV (A Child)* is that the court of first instance must base its future predictions on a specific finding of fact as to past conduct, proved on the balance of probabilities, as expounded in *In re J*.

Applying section 84

The second point of note in *EV (A Child)* is the Supreme Court's thorough and precise analysis of the statutory test in s84 of the 2007 Act. Section 84(3)-(5) is in the following terms:

> (3) The court may not make a permanence order in respect of a child unless it considers that it would be better for the child that the order be made than that it should not be made.
> (4) In considering whether to make a permanence order and, if so, what provision the order should make, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration.
> (5) Before making a permanence order, the court must -
> (a) after taking account of the child's age and maturity, so far as is reasonably practicable -
> (i) give the child the opportunity to indicate whether the child wishes to express any views, and
> (ii) if the child does so wish, give the child the opportunity to express them,
> (b) have regard to -
> (i) any such views the child may express,
> (ii) the child's religious persuasion, racial origin and cultural and linguistic background, and
> (iii) the likely effect on the child of the making of the order, and
> (c) be satisfied that -

[18] *EV (A Child)*, para 22, citing Lady Hale in *In re J*, para 49.
[19] *EV (A Child)*, para 23, citing Lord Hope in *In re J*, para 84.

> (i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence, or
> (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child.

In brief, these subsections impose a statutory duty on the court to consider the no order principle, the welfare principle, the views of the child, and a range of other factors, including any racial, cultural, or linguistic sensitivities. As Lord Reed explained:

> These three subsections are of a different character from one another, and are to be applied in different ways. Section 84(5) is particularly complex. Subsections (a) and (b)(i) impose duties in respect of ascertaining and considering the views of the child, so far as is reasonably practicable. In the present case, given the very young age of the child, those duties did not arise. Subsection (b)(ii) and (iii) impose duties to have regard to specified factors. In the present case, two of the factors mentioned in subsection (b)(ii) are relevant, namely the child's racial origin and cultural and linguistic background.
>
> Section 84(5)(c) is of a different nature. It lays down a factual test in each of subsections (c)(i) and (ii). One or other of those tests must be satisfied before a permanence order can be made. *Section 84(5)(c) therefore imposes a threshold test. It has to be addressed, and satisfied, before any issue requires to be considered under the other provisions of section 84*.[20]

Thus, the starting point for any judicial consideration of a permanence order petition is s84(5)(c). Yet the very fact that this critical threshold test is the final subsection of a lengthy statutory provision does not reflect its primacy, or direct the reader – or court – to consider it before all other statutory requirements.[21] The likely consequence is that this test may be conflated with the preceding subsections, or overlooked altogether, rather than evaluated at the outset.[22] Lord Reed cited, with approval, the concerns of the Inner House in the 2016 case of *KR v Stirling Council*:

> The threshold test [in s84(5)(c)] is in our opinion a matter of fundamental importance, and we must express regret at the manner in which section 84 of the Adoption and Children (Scotland) Act 2007 is structured. In that section the fundamental threshold provision comes at the end, after the subsections dealing with the welfare of the child. It would clearly be more sensible to state the threshold test at an earlier point, before the welfare provisions, because the threshold test must be satisfied before any of the other provisions becomes relevant. As matters stand there is an obvious risk that the sheriff will fail to appreciate the fundamental importance of the criterion in subsection (5). That is what appears to have happened in the present case. We were informed that subsection (5) was added to section 84 at a very late stage in the Parliamentary procedure, when it became apparent that no criterion for dispensing with parental consent had been specified. If that is

[20] *EV (A Child)* paras 10-13, emphasis added.
[21] The potential for going astray in applying this statutory test was addressed in detail at *EV (A Child)* para 31.
[22] The fact that the correct approach had already been laid out by the Inner House in *TW* v *Aberdeenshire Council*, [2012] CSIH 37, but courts were nevertheless continuing to err in their application of the statutory provisions, rather proves the point.

> so, it clearly represents a serious error on the part of those responsible for determining the policy of the section and instructing Parliamentary counsel. The result is a very poor piece of draughtsmanship. *For the future, any court in considering whether or not to impose a permanence order must have regard to the fact that the test in subsection (5) is a threshold test, and that it must be satisfied before the other provisions of section 84 become relevant.*[23]

Despite s84 requiring consideration of the welfare principle and the views of the child, these are actually matters to be considered *after* establishing that the threshold test in s84(5)(c) has been satisfied. If s84(5)(c) cannot be satisfied, then the other elements of s84 do not come into play and there is nothing further to be done: the permanence order cannot be granted.

The Threshold Test: s84(5)(c)

The test in s84(5)(c) can be fulfilled in one of two ways, and both elements make reference to the parental rights granted in s2 of the 1995 Act. These parental rights enable parents (or anyone who holds them) to exercise certain rights in respect of the child, and they are all framed in terms of the responsibilities imposed on the holder under s1 of the 1995 Act. Thus, s1 requires a parent (or other person who has parental responsibilities) to safeguard and promote the child's health, development and welfare; to provide direction and guidance, to maintain personal relations and direct contact with the child, and to act as the child's legal representative.[24] To this end, s2(1)(a) includes the right to have the child living with him or otherwise regulate the child's residence.[25] Under s84(5)(c)(i), where it is established that there is *no* person who has the right in s2(1)(a) of the 1995 Act to have the child living with him/her or otherwise to regulate the child's residence, then the threshold test is fulfilled, and the other requirements of s84 may be addressed. However, it is rare that there will be no such a person or persons – typically a parent[26] – and so the court will normally have to turn to s84(5)(c)(ii). Here, the threshold will only be crossed where the court finds it established that the child's residence with such a person "is, or is likely to be, seriously detrimental to the welfare of the child."[27] It is in assessing this that the court may need to apply Lord Hope's "golden rule", in using past conduct established as a finding of fact, on the balance of probabilities, to determine the

[23] *KR v Stirling Council*, para 15, emphasis added.
[24] Section 1(1)(a)-(d) of the 1995 Act, all qualified "in so far as compliance with this section is practicable and in the interests of the child."
[25] The other rights granted in s2 are to enable the holder to fulfil the other responsibilities in s1.
[26] In this note, such a person will be referred to as the "parent" for simplicity, although of course it may not be the parent who holds the relevant parental right in s2(1)(a) of the 1995 Act.
[27] As Norrie observes, this should be read as extending to everyone who has the right to determine the child's residence, not just any one person: Norrie, *Parent and Child*, para 20.14.

likelihood that the child's residence with the parent will be seriously detrimental to the child's welfare.

Further Guidance on the s84(5)(c)(ii) Threshold Test

Three points can be made about this threshold test.

In the first place, as the Inner House noted in *KR v Stirling Council* when highlighting the erroneous approach of the sheriff, the test "does not require that the residence with the respondent is likely to be detrimental, but that it is likely to be *seriously* detrimental."[28] This higher standard must be met, and the judge at first instance should ideally be explicit that this is the test being applied.

Secondly, conflating the different elements of s84 – welfare; child's views; no order; serious detriment – will result in an incorrect approach to the statutory test. Since s84(5)(c) is a factual test, these elements are not applicable to determine that fact: only where the fact of "serious detriment" has been established will the judge need to consider whether to grant the permanence order, with reference to the no order principle,[29] the welfare of the child,[30] and the views of the child.[31] The Inner House was explicit about this in *KR v Stirling Council*: "It is only if the test is satisfied that the court requires to go on to consider the welfare of the child."[32]

The third element is that, in addressing s84(5)(c)(ii), the court may take into account not only the child's future life with the parent(s), but also the current placement of the child. Lord Reed highlighted this, with reference to the Lord Ordinary's omission:

> … the Lord Ordinary did not support his conclusion by an analysis of the benefits and detriments of the available options. Although much was said about the local authority's concerns about the father's behaviour years earlier, nothing was said, for example, about how the child's current foster care arrangements were working, or about the prospects of a suitable adoptive placement being found. There was no analysis of the merits of her living with a foster carer who has no intention of adopting her, as compared with her living with her parents. At the most basic level, the possibility of her parents' being able to offer her a permanent home might have been a relevant factor, particularly if the prospects of her being adopted were poor, to set against the negative factors.[33]

[28] *KR v Stirling Council*, para 19.
[29] Section 84(3).
[30] Section 84(4): as with ss11 and 16 of the 1995 Act, the welfare of the child is to be the paramount consideration at this stage.
[31] Section 84(5)(a) and (b).
[32] *KR v Stirling Council*, para 13, citing *TW* v *Aberdeenshire Council*, [2012] CSIH 37 at paras [12]-[13].
[33] *EV (A Child)*, para 53.

This holistic approach can be seen in practice in the 2016 Outer House decision in *West Lothian Council, A & B*. Lord Glennie concluded that the mother's position alone did not risk serious detriment to the children's welfare:

> I do not find it established that M's parenting shortcomings alone would or should prevent the children being returned to her care. There are shortcomings, plainly, but they could be substantially overcome with time and support...[34]

However, held in balance against this was the fact that the children were happy and settled in their placements. Quoting from Cumming-Bruce LJ in "less prosaic times", the Lord Ordinary observed: "… you cannot dig up children in the way that you dig up geraniums: they form emotional roots and those roots have to be preserved intact."[35] The negative impact of moving children from their long-established and successful placements was just as relevant when assessing the possibility of future serious detriment, and led the judge to conclude:

> In my opinion there is a serious though unquantifiable risk that any attempt to rehabilitate the children, or even one of them, to her care would end in failure. That would cause enormous disruption to their lives at a very vulnerable time. Their present placements, where they are settled in and very happy, might well not be available to them. In those circumstances I am satisfied that returning the children to live with their mother is likely to be seriously detrimental to their welfare.[36]

The whole circumstances of the child's life are therefore relevant.[37] The importance of considering the child's placement also emphasises the crucial importance of acting promptly in trying to secure the return of children: in many cases, by the time the parent has addressed the problems which necessitated the children being taken into care in the first place, too much time will have passed, and the risk of damaging the new roots which have been established will outweigh the parent's case.[38]

Consent of the Child

[34] *West Lothian Council, A&B*, paras 96-97.
[35] *West Lothian Council, A&B*, para 62, citing Cumming-Bruce LJ in *In re L. (Child in Care: Access)* [1985] F.L.R. 95, 100, quoted with approval by Lord Oliver of Alymerton in *In re KD (A Minor) (Ward: Termination of Access)* [1988] 1 AC 806 at 829-830.
[36] *West Lothian Council, A&B*, para 104.
[37] In this context, Norrie notes that the court must focus on the child's long-term welfare, rather than immediate welfare: Norrie, *Parent and Child*, para 20.15.
[38] See also, for example, *Midlothian Council re Child S* [2012] CSOH 63, paras 186-187 (upheld on appeal: [2013] CSIH 71).

While section 84(5)(c) provides us with a threshold test which must be satisfied first, there is in fact one prior step, albeit this may not be relevant in all cases. Under s84(1), where a child is 12 years or older, and is capable of giving consent, then the permanence order may not be granted unless the child so consents.[39] In the absence of such consent, the petition can go no further, and there will be no need to consider the threshold test. If the child does consent, then the court may continue with the application of the threshold test, and then the remaining provisions in s84 – one of which includes taking the views of the child into consideration. (And of course, the views of a child under 12 may also be relevant, depending on the age and maturity of the child: but there is no need to obtain *consent* from a child under the age of 12.)

Permanence Orders: A Proposed Checklist

Taking the key points from these three decisions – *EV (A Child)*, *KR v Stirling Council*, and *West Lothian Council, A&B* – it is possible to construct a checklist for seeking (or contesting) a permanence order under ss80-84 of the 2007 Act. This attempts to draw together the key elements of the statutory provisions and marshal them in the correct order for consideration, as outlined by the courts. Critically, this order differs from the order in which they appear in the 2007 Act. The proposed checklist is:

1. Sections 84(1) and (2): Is the child aged 12 or over? If so, has the child consented (s84(1)) or is the court satisfied that the child is incapable of giving consent (s84(2))? If a child over 12 is capable of giving consent and has not done so, there is no power to make the permanence order. In all other cases, the court may proceed to Q.2.

2. Section 84(5)(c) – the "threshold test". In terms of s84(5)(c)(i), is the court satisfied that "there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence"? If "yes" (ie there is no such person), then the threshold test has been satisfied and the court may proceed to Q.4. If "no" the court must address Q.3.

3. Section 84(5)(c)(ii) – where there is someone who has the statutory right to have the child living with them or to regulate the child's residence, is the court satisfied that "the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the

[39] See for example *West Lothian Council, A&B*, para 56.

child"? If "yes" the court may proceed to Q. 4.

To answer this question, the court may be guided by past conduct of the parties, but only where proved as fact, on the balance of probabilities, and not merely a possibility, as per Lord Hope's "golden rule" in *In re J*. Moreover, the court may also take into account not only the position of the parents or person seeking residence, but also the other options open for the child, including the advantages of the child's current home.

If the threshold test cannot be satisfied, the court may not make the permanence order.

4. If the threshold test has been satisfied, the court must consider the other aspects of the statutory test before making the order. This requires the court to address each of the following points:
    a. Section 80(3): establishing that each parental right and responsibility in respect of the child vests in a person;[40]
    b. Section 84(3): establishing that it is better for the Court to make the order than that it should not be made;
    c. Section 84(4): to have regard to the welfare of the child throughout childhood as the paramount consideration;
    d. Section 84(5)(a): taking account of the child's age and maturity, so far as reasonably practicable give the child (a) the opportunity to indicate whether the child wishes to express any views and (b) if the child does wish to do so, give the child the opportunity to express them. Note that in terms of s84(6) a child aged 12 or over is presumed to be of sufficient age and maturity to express a view, but this does not imply that a child under 12 is not of sufficient age and maturity;
    e. Section 84(5)(b)(i): to have regard to any such views expressed by the child;
    f. Section 84(5)(b)(ii): to have regard to the child's religious persuasion, racial origin and cultural and linguistic background;[41] and
    g. Section 84(5)(b)(iii): to have regard to the likely effect on the child of the making of the order.

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[40] See also *EV (A Child)*, para 50.
[41] *EV (A Child)*, paras 49 and 62.